ST 96-17
Tax Type: **SALES TAX**
Issue: **Foreign Airline Exemption**

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)		
OF THE STATE OF ILLINOIS)	Docket No.	
)		
v.)	IBT No.	
)		
TAXPAYER,)	Claim for Credit	
)	Admin. Law Judge	
Taxpayers)	Mary Gilhooly Japlon	

RECOMMENDATION FOR DISPOSITION

Appearances: The Department of Revenue of the State of Illinois, by Special Assistant Attorney General Mary Kennedy, on behalf of the Illinois Department of Revenue; ATTORNEY, on behalf of TAXPAYER

SYNOPSIS:

The instant action involves a denial of a claim for credit for Retailers' Occupation and related taxes paid by TAXPAYER (hereinafter "TAXPAYER" or "taxpayer") for the period March 1, 1985 through October 31, 1987 in the amount of $311,902.93. The Department of Revenue (hereinafter "Department") denied the taxpayer's claim for credit on February 16, 1988. The administrative tribunal granted the Department's motion for partial summary judgment for the claim period July 1, 1987 through October 31, 1987, thereby reducing the amount of the claim to $277,205.17.

The parties filed a Stipulation of Facts, a Stipulation as to Admitted Documents and a Stipulation regarding the authenticity of certain documents. The parties chose to file memoranda in support of their respective positions in lieu of proceeding to hearing on the legal merits. A Memorandum of Law was filed on behalf of TAXPAYER, the Department filed a Reply Brief and the taxpayer filed a Reply to the Department's Brief.

FINDINGS OF FACT:

Based upon the stipulations filed herein as to the agreement of certain facts, the admissibility of certain documents and the authenticity of certain documents, the following findings are made:

1. TAXPAYER is a corporation with its world headquarters in XXXXX. (Stipulation of Facts, par. 1).

2. By way of letter to the Department of Revenue dated November 5, 1979, TAXPAYER, through its attorney, requested the issuance of a letter exempting TAXPAYER from ROT/Use Tax assessed on prior purchases of fuel and meals used in international flights. (Stipulation as to Admitted Documents, Ex. 3-A).

3. The exemption request was based upon TAXPAYER's "most favored nation" status pursuant to the Treaty of Friendship, Commerce and Navigation between XXXXX and the United States. (Stipulation as to Admitted Documents, Ex. 3-A).

4. By way of letter dated December 28, 1979, the Department found TAXPAYER to be exempt from State and local ROT, SOT, Use Tax and Service Use Tax on the basis that it was a governmental body. (Stipulation as to Admitted Documents, Ex. 3-B).

5. The exemption issued to TAXPAYER on the basis that it was a governmental body was issued prior to the time that the pertinent Department regulation (86 Ill. Admin. Code, ch. I, Sec. 130.2080) was amended to include paragraph c. (Stipulation of Facts, pars. 12 & 13).

6. Prior to September 26, 1984, regulation 130.2080 (previously known as Rule 40) provided as follows:

> (a) Sales made on or after March 31, 1963, to a governmental body (federal, state, local or foreign) are exempt from the retailers' occupation tax.
> (b) For the foregoing purposes, the date of sale is considered to be the date of delivery to the purchaser. (Stipulation of Facts, par. 12; 86 Ill. Admin. Code, ch. I, Sec. 130.2080).

7. Effective September 26, 1984, the Department amended the regulation by the addition of the following paragraph:

> (c) The purchase of meals, fuels and other tangible personal property by corporations in Illinois are taxable sales at retail, unless otherwise exempt, notwithstanding the fact that the stock of such corporations may be owned exclusively or in part by foreign governments.

(Stipulation of Facts, par. 13; 86 Ill. Admin. Code, ch. I, Sec. 130.2080).

8. TAXPAYER filed a comment in opposition to this rule making. (Stipulation of Facts par. 13).

9. The Department of Revenue granted AIRLINE, also known as AIRLINE, (hereinafter known as "AIRLINE"), an exemption from Use Tax on purchases of catered in flight meals, fuel and other tangible personal property. (Stipulation of Facts, par. 15).

10. AIRLINE originally requested the exemption on the grounds that it was part of the government of COUNTRY; it renewed its exemption request and was granted an exemption number on the same basis. (Stipulation as to Admitted Documents, Ex. No. 7).

11. AIRLINE is not a corporation.

12. The exemption granted to AIRLINE remained in effect throughout the TAXPAYER claim period. (Stipulation of Facts, par. 16).

13. Throughout TAXPAYER's claim period, the XXXXX Ministry of Finance owned approximately 35% of the issued and outstanding stock of TAXPAYER. (Stipulation of Facts, par. 6).

14. As of March 31, 1979, the government of XXXXX had guaranteed 15.79% of TAXPAYER's long-term debt, in the amount of $80,377,000. TAXPAYER's long-term debt on said date was in the amount of $509,024,000, and TAXPAYER's total stockholders' equity on that date was in the sum of $252,828,000. (Stipulation of Facts, par. 7(a)).

15. As of March 31, 1980, the government of XXXXX had guaranteed 26.21% of TAXPAYER's long-term debt, in the sum of $180,838,000. TAXPAYER's long-term debt on March 31, 1980 was in the amount of $690,058,000, and TAXPAYER's total stockholders' equity on said date was in the amount of $328,098,000. (Stipulation of Facts, par. 7(b)).

16. On or about the beginning of TAXPAYER's claim period, the government of XXXXX had guaranteed at least 84.64% of TAXPAYER's long-term debt, in the sum of $993,956,000. TAXPAYER's long-term debt at said time was $1,174,291,000, and TAXPAYER's total shareholders' equity on that date was in the sum of $569,562,000. (Stipulation of Facts, par. 7(c)).

17. As of March 31, 1986, the government of XXXXX had guaranteed 93.15% of TAXPAYER's long-term debt, in the sum of $1,660,421,000. TAXPAYER's total long-term debt on March 31, 1986 was in the sum

of $1,782,556,000, and TAXPAYER's total stockholders' equity on that date was in the amount of $789,939,000. (Stipulation of Facts, par. 7(d)).

18. As of March 31, 1987, the government of XXXXX had guaranteed 85.29% of TAXPAYER's long-term debt, in the amount of $2,222,657,000. TAXPAYER's total long-term debt on said date was in the amount of $2,606,075,000, and TAXPAYER's total stockholders' equity on said date was in the amount of $923,493,000. (Stipulation of Facts, par. 7(e)).

19. The government of XXXXX has not participated in this administrative proceeding in its capacity as a foreign government. (Stipulation of Facts, par. 8).

20. During TAXPAYER's claim period, TAXPAYER paid taxes based on its earnings to the XXXXX government. (Stipulation of Facts, par. 9).

21. During TAXPAYER's claim period, TAXPAYER had no person in its employ who was deemed by the XXXXX government to be an officer, employee or agent of the government of XXXXX by reason of his or her relationship to TAXPAYER. (Stipulation of Facts, par. 10).

22. During TAXPAYER's claim period, TAXPAYER had no officer, employee or agent who possessed any diplomatic status as a representative of the XXXXX government by reason of his or her relationship to TAXPAYER. (Stipulation of Facts, par. 11).

23. The Articles of Incorporation of TAXPAYER as amended June 30, 1982 provide that the Government of XXXXX may guarantee the liabilities of TAXPAYER, pursuant to laws or regulations (Article 9). (Stipulation as to Admitted Documents, Ex. 5).

24. Article 22 of said Articles of Incorporation speaks in regard to shareholder voting rights and provides *inter alia* "... that in cases where the shareholder is the Government ..., such vote may be exercised by an official of the Government ...". (Stipulation as to Admitted Documents, Ex. 5).

25. The Articles of Incorporation of TAXPAYER as amended June 30, 1982 discuss the procedure for the appointment of directors. The Articles grant the government of XXXXX no more voting rights than any other qualified shareholder. (Stipulation as to Admitted Documents, Ex. 5).

26. TAXPAYER filed an application for registration as a business taxpayer with the Department dated April 25, 1985. Said application identified the type of business engaged in by TAXPAYER as

"international air transportation" and stated that TAXPAYER began doing business in Illinois on March 1, 1985. (Stipulation as to Admitted Documents, Ex. No. 9).

27. Between March 1985 and October 1987, TAXPAYER filed returns and paid use taxes monthly.

28. On December 18, 1987, TAXPAYER filed a claim for credit for the period of March 1985 through October 1987, alleging that the claim should be granted on the grounds that TAXPAYER erroneously reported and paid Illinois Use Tax on its fuel purchases. TAXPAYER asserts in its claim for credit that the sale was to an exempt organization, specifically a governmental body. (Stipulation as to Admitted Documents, Ex. No. 1).

29. On February 16, 1988, the Department issued a tentative denial of claim, stating that it had not been definitely established that the tax was paid in error or that the issuance of a credit memorandum would not result in the unjust enrichment of TAXPAYER. (Stipulation as to Admitted Documents, Ex. No. 2).

30. Pursuant to the Department's Motion for Partial Summary Judgment, TAXPAYER's claim for all periods subsequent to June 30, 1987 was denied. (Order entered January 28, 1993).

31. The basis for the granting of the motion was TAXPAYER's failure to comply with the provisions set forth in the pertinent statutes (35 **ILCS** 105/3-5(4); 35 **ILCS** 120/2-5(11)) which state that after July 1, 1987, no entity otherwise eligible for the exemption set forth therein shall be entitled to exempt treatment unless it has an active exemption number issued by the Department.

32. The amount of TAXPAYER's claim for the period of March 1, 1985 through June 30, 1987 is $277,205.17. (Stipulation of Facts, par. 4).

CONCLUSIONS OF LAW:

TAXPAYER, taxpayer herein, filed a claim for credit for taxes paid pursuant to section 19 of the Use Tax Act (35 **ILCS** 105/1 *et seq.*). Said statutory provision provides in pertinent part as follows:

> If it shall appear that an amount of tax or penalty or interest has been paid in error hereunder to the Department by a purchaser, as distinguished from the retailer, whether such amount be paid through a mistake of fact or an error of law, such purchaser may file a claim for credit or refund with the Department. (35 **ILCS** 105/19).

The claim filed by TAXPAYER was denied by the Department on the basis that the taxpayer did not establish that it paid the tax in error, or that the issuance of a credit would not result in the unjust

enrichment of the claimant. (Stipulation as to Admitted Documents, Exhibit 2). The Department contends that the taxpayer has failed to satisfy the prerequisite under the Use Tax Act that the amount claimed as a credit must have been paid initially pursuant to a mistake of fact or an error of law. I find this position weak and untenable.[1]

When the taxpayer originally sought an exemption from the payment of Use Tax in November 1979, the request was premised upon TAXPAYER's "most favored nation" status pursuant to the Treaty of Friendship, Commerce and Navigation between XXXXX and the United States. (Stipulation as to Admitted Documents, Exhibit 3-A). TAXPAYER was granted the exemption by letter issued by the Department on December 28, 1979, however, on the rationale that it was a governmental body under Rule No. 40, which was subsequently codified as 86 Ill. Admin. Code ch. I, Sec. 130.2080. (Stipulation as to Admitted Documents, Exhibit 3-B).

Prior to September 26, 1984, section 130.2080 provided as follows:

> (a) Sales made on or after March 31, 1963, to a governmental body (federal, state, local or foreign) are exempt from the retailers' occupation tax.
>
> (b) For the foregoing purposes, the date of sale is considered to be the date of delivery to the purchaser. (86 Ill. Admin. Code, ch. I, Sec. 130.2080).

Effective September 26, 1984, the above-cited regulation was amended by the addition of the following subsection:

> (c) The purchase of meals, fuels and other tangible personal property by corporations in Illinois are taxable sales at retail, unless otherwise exempt, notwithstanding the fact that the stock of such corporations may be owned exclusively or in part by foreign governments.

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1. The Protest Monies Act, 30 **ILCS** 230/2 *et seq.*, is an avenue for a taxpayer to pay taxes under protest, and have the issue decided by the Circuit Court. TAXPAYER determined not to elect this route, but instead chose to file a claim for credit. This is certainly an appropriate procedure for a taxpayer to take when seeking a refund of tax it concludes was paid in error, as the taxpayer herein claims. As long as the claim was filed timely, the claim for credit provision is a viable and suitable alternative to the Protest Monies Act. In the case at bar, the limitations provision set forth in section 21 of the Use Tax Act has not been abrogated.

The regulation was amended pursuant to proper procedures and authority. In accordance with the Administrative Procedures Act (5 **ILCS** 100/1-1 *et seq.*), the Joint Committee on Administrative Rules (JCAR) of the Illinois General Assembly was responsible for reviewing the statutory authority on which the proposed amendment to regulation 130.2080 was based, and to determine whether the proposed amendment was actually within the statutory authority. TAXPAYER was well aware of this proposed amendment because pursuant to statutory provision, the taxpayer did file a comment in opposition to this rule making. In spite of this, there is no indication that JCAR posed any objection to the proposed amendment.

In December 1987, the taxpayer/claimant filed its claim for credit seeking an exemption from tax as an exempt organization, specifically, a governmental body. (Stipulation as to Admitted Documents, Exhibit No. 1). The Department denied the claim in February 1988. The claim as filed was for the period March 1985 through October 1987. However, due to the failure of the taxpayer to apply for an exemption identification number from the Department as mandated by the pertinent exemption provisions (35 **ILCS** 105/3-5(4); 35 **ILCS** 120/2-5(11)), the claim period subsequent to June 30, 1987 was dismissed from this cause of action pursuant to the Department's Motion to Dismiss.

The ultimate issue in this fact specific case is whether TAXPAYER is a governmental body. It is the taxpayer/claimant's burden to prove its entitlement to the exemption, with all doubts being resolved in favor of taxation. (*United Airlines, Inc. v. Johnson*, 84 Ill.2d 446 (1981); *Follett's Illinois Book & Supply Store, Inc. v. Isaacs*, 27 Ill.2d 600 (1963)). Section 12 of the Retailers' Occupation Tax Act provides that "[t]he Department is authorized to make, promulgate and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act as may be deemed expedient." (35 **ILCS** 120/12). Neither the statute nor the regulation provides a definition of "governmental body", other than the description of "governmental body" in subsection (a) of the regulation at issue as being federal, state, local or foreign. Absent statutory authority, the Department, therefore, has defined what a governmental body *is not* in the 1984 amendment to section 130.2080.

Pursuant to this authority, the Department promulgated the amendment, as well as the amendment to the regulation at issue, all in accordance with the Administrative Procedures Act (5 **ILCS** 100/1-1 *et seq.*). As noted previously, TAXPAYER was well aware of the proposed amendment, as if evidenced by the fact that it

filed a comment in opposition to the rulemaking, but the amendment was adopted without any objection by JCAR. The taxpayer asserts that the amendment to section 130.2080 by the addition of paragraph (c) conflicts with the statutes exempting governmental bodies from taxation (35 **ILCS** 105/3-5(4); 35 **ILCS** 120/2-5(11)), and that it expands the class of taxpayers subject to the Use Tax Act. (Du-Mont Ventilating Co. v. Department of Revenue, 73 Ill.2d 243 (1978)).

A primary rule of statutory construction is that "an undefined statutory term must be given its ordinary and popularly understood meaning. (Canteen Corp. Department of Revenue, 123 Ill.2d 95, 105 (1988)). Courts will often look to a dictionary to determine a word's "plain and ordinary" meaning, or to other statutes which may define a particular term. (*See generally* Canteen, *supra*).

The term "governmental body" is defined in Black's Law Dictionary (Fifth Edition) by reference to the terms "Administrative agency; Governmental agency; Governmental subdivision". "Governmental agency" is defined as follows in Black's Law Dictionary: "[a] subordinate creature of federal, state or local government created to carry out a governmental function or to implement a statute or statutes."

"Governmental functions" is defined by Black's as follows:

> The functions of a municipality which are essential to its existence, in sense of serving public at large, and are to be distinguished from those which are private, which are not necessary to its existence, and which enure to advantage of its inhabitants. (Citation omitted). Activities which are carried on by city, pursuant to state requirement, in discharge of state's obligation for health, safety or general welfare of public generally, or which are voluntarily assumed by city for benefit of public generally rather than for its own citizens, are performed in governmental capacity and as "governmental function". (Citation omitted).
>
> Where duty involves general public benefit not in nature of corporate or business undertaking for corporate benefit and interest of municipality, function is "governmental," whether duty be directly imposed or voluntarily assumed. Those conferred upon municipality as local agency of prescribed and limited jurisdiction to be employed in administering the affairs of the state and promoting the public welfare generally. (Citation omitted).

There is a void of evidence herein to indicate that the taxpayer is in any way a subordinate creature of the XXXXX government, let alone is there any proof that TAXPAYER performs activities essential to the existence of the government of XXXXX, and which benefit the welfare of the public at large. The corporate

documents in evidence do not indicate that TAXPAYER is an entity ancillary to the government of XXXXX. Furthermore, there is certainly no documentary evidence to demonstrate that TAXPAYER was organized to carry out any governmental function.

What the evidence does indicate is that throughout the claim period the Minister of Finance for the government of XXXXX owned a portion of the issued and outstanding stock of TAXPAYER (i.e., approximately 35 percent). In regard to shareholder voting rights, the Articles of Incorporation of TAXPAYER specifically provide that "... in cases where the shareholder is the Government ..., such vote may be exercised by an official of the Government... ". The Articles are silent in regard to the XXXXX Government's right to vote for directors of TAXPAYER, which indicates that the Government is entitled to participate in the election of directors in the same manner as are all other TAXPAYER shareholders.

The regulation as amended specifically provides that the ownership of stock in a corporation by a government does not equate to said corporation being a governmental body. Taxpayer's assertions notwithstanding, there is nothing on the face of this regulation amendment which is in conflict with any statutory provisions, or in any manner expands the class of entities subject to the Use Tax. By making such claims, taxpayer attempts to avoid addressing its own right to the exemption it seeks.

TAXPAYER, by law, must prove its entitlement to the exemption on the merits. The fact that the Government of XXXXX owned a percentage of TAXPAYER's stock during the claim period is not sufficient, standing alone, to equate TAXPAYER with governmental body status. It is but one factor to consider when making the determination whether TAXPAYER is entitled to the exemption as a governmental body. The rights accorded TAXPAYER as a stockholder are not determinative of whether TAXPAYER is a governmental body; said rights are accorded all stockholders of TAXPAYER. Additionally, the record is silent as to whether any members of the XXXXX government were elected to the Board of Directors. It is clear from the stipulated facts that during the claim period TAXPAYER did not employ any person who was deemed by the XXXXX government to be an officer, employee or agent of the government by reason of his or her relationship to TAXPAYER. Nor did TAXPAYER engage any officer, employee or agent who possessed diplomatic status as a representative of the government of XXXXX by reason of his or her relationship to TAXPAYER.

Furthermore, the fact that the Articles of Incorporation as amended June 30, 1982 provide that the XXXXX government can guarantee TAXPAYER's liabilities, and the fact that the XXXXX government did guarantee TAXPAYER's long term debt, does not transform TAXPAYER into a governmental body. The taxpayer has provided no support for this conclusion, nor have I found any. The guaranteeing of liabilities can be viewed as a precautionary and protective measure so as to guard against financial loss. The guarantee of liabilities also aids in bolstering the attractiveness and appealability of the stock. This factor standing alone, or even in conjunction with the fact that the XXXXX government owned a percentage of TAXPAYER stock, does not turn TAXPAYER into an arm of the government.

The taxpayer contends that the amendment to the regulation discriminates against corporations. On the contrary, all that subsection (c) of section 130.2080 does is ensure that corporations are treated as all other entities which seek the exemption. Unless an entity (corporate or non-corporate) qualifies for the exemption because it is a "governmental body", the exemption does not apply. Government ownership of stock does not in and of itself convert a corporation into a governmental body. A non-corporate entity would have to manifest it was a governmental body by presenting evidence of organizational structure, functions, activities and purposes. If these characteristics taken as a whole evidenced that the entity was a "governmental body", it would qualify for the exemption. The amendment to the regulation simply places corporations on the same plane as non-corporations.

Illinois is not alone in its insistence that a corporation owned even exclusively by a foreign government is not entitled to an exemption based solely upon its organizational form. Pursuant to the Department's regulation, a corporation, owned in whole or in part by a foreign government, does not automatically qualify as a governmental body. The position of the Internal Revenue Service is even more stringent. The IRS treats a corporation separate and distinct from its owners, the stockholders. Regarding federal income taxation, exemptions extended to foreign governments do not apply to a corporation simply because its stock is wholly owned by a foreign government. Section 892 of the Internal Revenue Code (26 USC sec. 892) provides in relevant part that the income of foreign governments received from investments in the United States or interest on bank deposits in the United States shall be exempt from taxation. Revenue Ruling 66-73, 1966-1 C.B. 174 provides in part that it is the position of the Internal Revenue Service that an

organization separate in form and wholly owned by a foreign government, and no part of the net earnings of which inures to the benefit of any private shareholder or individual, regardless of where organized and whether with stock outstanding, is exempt under section 892 of the Internal Revenue Code *provided it does not constitute a corporation* as that term is generally understood in the United States. (Emphasis added).

In reviewing the test utilized in the ruling letter as to whether an organization constitutes a corporation, it is apparent that the Internal Revenue Service realizes that the mere ownership of stock in a corporation by a foreign government does not of necessity mean that the corporation is part of the government and therefore, entitled to receive exempt treatment on its income.

The Department is not distinguishing between foreign governmental bodies in a corporate form and a non-corporate form, as urged by the taxpayer. The key word is "governmental". It is not a given that a foreign business entity (corporate or not) is "governmental", and therefore exempt from Use Tax on its purchases, until it is examined in detail. Again, mere stock ownership and the underwriting of liability does not transform the corporation at issue into a governmental body. If a foreign corporate entity can show that it is in fact governmental, it will receive the same tax treatment (i.e., exemption) as a foreign non-corporate entity which is a governmental body. In order for the non-corporate entity to have warranted the exemption, it's governmental status would of necessity be manifest.

Furthermore, the amendment to section 130.2080 does not conflict with the statutes exempting governmental bodies from taxation (35 **ILCS** 105/3-5(4); 35 **ILCS** 120/2-5(11)), nor does it expand the class of taxpayers subject to the Use Tax Act. Pursuant to the Administrative Procedures Act (5 **ILCS** 100/1-1 *et seq.*), the Joint Committee on Administrative Rules (JCAR) of the Illinois General Assembly was responsible for reviewing the statutory authority on which the proposed amendment to regulation 130.2080 was based, and to determine whether the proposed amendment was actually within the statutory authority. There is no indication of any objection by JCAR to the proposed amendment. Section 5-100(f) of the Illinois Administrative Procedure Act provides that the failure of JCAR to object to any proposed amendment shall not be construed as implying direct or indirect approval of the amendment by either JCAR or the General Assembly. However, given the fact that since 1984, the year the amendment became effective, the legislature has not changed the statutes at issue is indicative that it does not disagree with the interpretation of the act.

That is, it implies that the amendment does not conflict with the ROT or Use Tax Acts, and that the Department did not enact a regulation that impermissibly expands the scope of the taxing statutes.

TAXPAYER's contention that the amendment to regulation section 130.2080 reversed a long-standing policy of exempting all governmental bodies from ROT and Use Tax in an attempt to "strip" the governmental body exemption from foreign governmental air lines is unsound. The fact that there exists a letter from the Department dated March 30, 1977 to one of the attorneys representing TAXPAYER pertaining to the extension of the governmental body exemption to partially owned or nongovernmental-owned airlines due to most favored nations clauses is totally irrelevant. Aside from the fact that there is no indication that the letter was in reference to TAXPAYER, as opposed to a different foreign air line represented by the same counsel, it was drafted years prior to the claim period at issue. Subsequent to June 30, 1987, the ROT and Use Tax Acts provided that no exemption from tax will apply unless the taxpayer has an active exemption number issued by the Department of Revenue. The taxpayer failed to apply for said exemption number, thereby delaying the denial of the exemption. Had the taxpayer applied for an exemption number prior to July 1, 1987, it would have been informed at that point in time of the Department's position concerning its exempt status.[2] It is also apparent that the taxpayer was aware of the amendment to regulation section 130.2080 that was proposed by the Department, as TAXPAYER filed in comment in opposition thereto before JCAR.

Thus, the taxpayer's assertion that the Department reversed a long-standing policy is merely a red herring designed to draw attention away from the bona fide issue in this case; i.e., whether TAXPAYER is a governmental body. The taxpayer, by this assertion implies that the Department can not amend or reverse its policies. This is also incorrect. For instance, by statute, the Department can amend its regulations, which is certainly one method by which it can evidence a change in policy, procedure or interpretation of the law. (5 **ILCS** 100/1-1 *et seq.*).

TAXPAYER points to the various internal Departmental memoranda (the authenticity, but not the admissibility, of which has been stipulated to) and suggests that the Department's intentions in amending regulation section 130.2080 were nefarious. Again, the regulation at issue was amended in accordance with the

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2. TAXPAYER's claim for the period subsequent to June 30, 1987 was dismissed for failure to comply with the statutes. (*See*: Findings of Fact, par. 30, 31).

law. All procedures were properly followed. In fact, TAXPAYER filed a comment in opposition to the proposed amendment before JCAR, but the amendment was ultimately adopted without any objection from JCAR.

The taxpayer urges that the "non-uniform" distinction between the tax treatment of AIRLINE, also known as AIRLINE ("AIRLINE") and TAXPAYER results in a violation of the Uniformity Clause of the Illinois and United States Constitutions. AIRLINE was exempt from Retailers' Occupation and Use Taxes during the entire claim period at issue. First, it is noted that AIRLINE is not a corporation. In addition, and in complete accord with the burden placed on TAXPAYER, in order for AIRLINE to have been granted an exemption, said entity had to have offered proof that it was a "governmental body". Exhibit No. 7 of the stipulated documents contains correspondence to and from the Department of Revenue pertaining to AIRLINE's exemption request and the granting thereof. In a letter from the Director of the Midwest & Central States of AIRLINE Airlines to the Department of Revenue, it states in relevant part that:

> AIRLINE Airlines was established in 1947 by the government of the Socialist Federal Republic of COUNTRY as a department of the Ministry of Aviation. ... COUNTRY is a socialist country and we do not have any private companies or organizations. All companies in COUNTRY belong to the AIRLINE society and are administered by the government.

Also part of Exhibit No. 7 is a letter from the AIRLINE Consul General confirming the contents of the above-quoted letter. Quite obviously, AIRLINE (which is not a corporation) provided proof to the Department that it is a "governmental body". It is owned by the government, and it is administered by government officials. All the amendment to the regulation at issue does is require a corporation, such as TAXPAYER, to likewise prove that it is a governmental body in order to qualify for the exemption from ROT and Use Tax. TAXPAYER has failed to provide evidence that it is in any substantive way, similar to AIRLINE.

The parties stipulated that prior to and at all times subsequent to September 26, 1984, there is at least one corporation which has been treated by the Department as exempt, as a governmental body, from ROT or Use Taxes on its purchases of fuel, meals and tangible personal property. However, the record contains no evidence regarding the nature of that corporation or what factors led the Department to grant the corporation a governmental body exemption. Without such information, there can be no comparison between

TAXPAYER and this unknown corporation. Therefore, there most surely cannot be any claim of unequal treatment.[3]

In sum, this taxpayer has attempted to avoid dealing with the issue at hand; whether it is a "governmental body", and therefore entitled to the exemption set forth in the Retailers' Occupation and Use Tax Acts. In filing its claim for credit (the Department's denial of which is what brings us ultimately to this hearing), this taxpayer asserted the governmental body exemption as the basis for seeking a refund. It is an exemption specifically set forth in the statutes, and addressed in the corresponding regulations. However, TAXPAYER proffers very little evidence in support of its claim of exemption. Those facts it does offer, such as the government ownership of TAXPAYER stock and the underwriting of TAXPAYER's long-term debts, do not lead to the conclusion that TAXPAYER is a governmental body. In a matter involving an allegation of exemption, the claimant must clearly prove its entitlement thereto. (United AirLines, Inc. v. Johnson, 84 Ill.2d

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3. In addition, the taxpayer argues that the most favored nations clause in the Treaty of Friendship, Commerce and Navigation between the U.S. and XXXXX entered into in 1953 mandates that TAXPAYER (a company of a signatory nation) be accorded the same tax treatment as granted companies or citizens of third countries. As AIRLINE (a third party entity) was granted an exemption for the entire period at issue, the taxpayer contends that the most favored nations clause commands that TAXPAYER also be exempt. Furthermore, TAXPAYER asserts that the treaty to which it is a party does not even contain the limitation that TAXPAYER must be in a "like situation" to entities of third countries, such as AIRLINE. However, even if the "like situation" provision is applicable, the taxpayer maintains that it would be exempt because like AIRLINE, it is engaged in international air transport.

The Department, on the other hand, asserts that if, in fact, the most favored nations clause in the treaty is relevant, the taxpayer would have to prove that it was similarly situated, or in a "like situation" compared to AIRLINE, which is a "governmental body". This is precisely the provision which the taxpayer stated on its claim for credit as the basis for which the claim should be granted.

It is my determination that the above-stated argument based upon the U.S./XXXXX "Friendship Treaty" is irrelevant, immaterial has been inappropriately raised by the taxpayer in its briefs. As the Department briefly responded to it, I feet it is necessary to summarize the issue and its resolution. On September 22, 1994, as Administrative Law Judge, I entered an Order denying the taxpayer's Motion for Summary Judgment, and granting the Department's Motion in Limine to exclude testimony pertaining to TAXPAYER's contention that the U.S./XXXXX Friendship Treaty mandates that the taxpayer's claim be allowed. An Offer of Proof was filed with the Department on behalf of the taxpayer, as well as XXXXX Airlines System ("XXXXX"), on January 5, 1995. The Offer of Proof pertains to testimonial evidence regarding the treaty issue and the most favored nation clauses therein.

It is interesting to note that even though the taxpayer seeks a refund on the basis that it is a "governmental body", it contends that due to the most favored nations clause in the treaty, there is no need to examine whether it is entitled to the exemption on the governmental body basis. The "governmental body" exemption is specifically set forth within the four corners of the ROT and Use Tax Acts; there is no mention of an exemption proffered on the basis of being a signatory to a treaty containing a most favored nations clause..

446 (1981)). In the instant case, the taxpayer/claimant has failed to do so. Therefore, the Department's determination denying the claim for credit must be sustained.

RECOMMENDATION:

It is my recommendation that the Department's denial of the claim for credit at issue herein be sustained in its entirety.

Enter:

_____
Administrative Law Judge